

Reminder: Reporting Your “Say-on-Frequency” Decision

September 7, 2017

Deadlines for calendar-year companies are rapidly approaching

Many companies were required to include “say-on-frequency” proposals in their 2017 annual meeting proxies. Under a say-on-frequency proposal, shareholders vote on an advisory basis whether they prefer a “say-on-pay” vote each year, every two years or every three years. This year, boards typically recommended and shareholders typically advised annual say-on-pay votes. After the advisory vote, the company must make and report its decision for the next six years regarding say-on-pay voting frequency.

In the annual meeting Form 8-K filed within four business days of the meeting, the company is required to report shareholder voting results on the say-on-frequency proposal. Either in the same Form 8-K, or in a subsequently filed Form 8-K/A, the company is required to report its decision in light of the shareholder advisory vote about how frequently say-on-pay votes will be held over the next six years.

If the company does not report its decision in the initial Form 8-K, the due date for the Form 8-K/A is the *earlier* of 150 days after the annual meeting and 60 days before the next Rule 14a-8 shareholder proposal deadline, as disclosed by the company in its proxy statement. This deadline is rapidly approaching for many companies that held annual meetings in May 2017.

Failure to comply with these Form 8-K deadlines results in a loss of Form S-3 shelf eligibility. In 2011, many companies overlooked the requirement to disclose their decision on the frequency of say-on-pay votes, assuming that since the shareholder advisory vote matched the board’s recommendation, no further disclosure was necessary. Because the SEC staff recognized that many companies simply hadn’t understood this disclosure requirement, the staff routinely granted waivers of the shelf eligibility defect. It is not yet clear how the staff will handle similar waiver requests this year.

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